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No. 82-372

In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS

v.

GROLIER INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. Respondent argues (Br. 8-11) that the documents at issue here do not fall within Exemption 5 of the FOIA because they were ordered released in civil discovery in *United States* v. *Americana Corp.*, Civ. No. 388-72 (D.N.J.). This contention is erroneous because Exemption 5 exempts "those documents * * * *normally* privileged in the civil discovery context" (*NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (emphasis added)) and not just those documents *always* privileged in that context. As this Court has stated (*id.* at 149 n.16):

> [I]t is not sensible to construe the Act to require disclosure of any document which would be disclosed in the hypothetical litigation in which the private party's claim is the most compelling. Indeed, the House Report says that Exemption 5 was intended to permit disclosure of those intra-agency memoranda which would "routinely be disclosed" in private litigation, H.R. Rep. No. 1497, p. 10, and we accept this as the law.

Thus, *Sears* forecloses respondent's argument that Exemption 5 does not apply if the documents sought under the FOIA have been ordered disclosed in civil discovery in one case. It is not reasonable to assume that a document held to be discoverable in one case based upon a showing of "substantial need" (Fed. R. Civ. P. 26(b)(3)) would be "routinely" available in any subsequent case or even in a later action involving the same parties. The rules of civil discovery require a showing of need in order to obtain disclosure of work product and contain no exemption for materials ordered to be disclosed in prior litigation.

If the Court were to adopt respondent's argument, the work product of government attorneys would become accessible under the FOIA whenever production is required in civil discovery, even if the action is terminated, by settlement or otherwise, before actual production occurs, or perhaps even where production is made subject to a protective order. Such a result would completely overrule the standards for disclosure established in *Sears*.

2. Respondent contends (Br. 11-16) that the documents at issue are not covered by Exemption 5 because they are allegedly the product of an "unauthorized and unethical covert investigation" (Br. 11). This claim was not raised before or decided by the court of appeals, and therefore this Court should decline to decide it in the first instance. *NLRB* v. *Sears, Roebuck & Co., supra,* 421 U.S. 132, 163-164 (1975); *Ramsey* v. *Mine Workers,* 401 U.S. 302, 312 (1971); *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 147 n.2 (1970).

Moreover, this claim is not based upon facts established in district court or supported by the record. Summary judgment was granted in favor of the Commission based upon certain undisputed material facts (see J.A. 27-29), none of which supports or even addresses respondent's allegations. Respondent's contention is also not supported by any facts stated in the district court's opinion based upon

its *in camera* examination of the documents at issue here. Significantly, neither the district court in this action nor Judge MacKinnon, both of whom viewed the documents *in camera*, found that they were the products of unauthorized or unethical activity. The district court in the *Americana* action also made no such finding.[1]

Respondent relies (Br. 1-6) upon the contents of documents relating to the *Americana* investigation that have been released, and based upon those documents, respondent draws conclusions, some of which are erroneous in important respects. However, those documents, much less

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[1]Furthermore, even if the truth of respondent's factual allegations is assumed, it is not clear that respondent's rights were violated. A statement by the Commission regarding approved methods of investigations would not necessarily give rise to any right that respondent could assert. See *United States* v. *Caceres*, 440 U.S. 741 (1979). It is also not clear that directing an FTC employee to enroll in an Americana sales training course in order to gather evidence regarding sales training materials and instructions (see Resp. Br. 12) violated DR 7-104(A)(1) of the Annotated Code of Professional Responsibility (1979). That rule contains an exception for communications "authorized by law," and federal law grants the FTC broad investigative power (see 15 U.S.C. (Supp. V) 46(a)). There is also authority for the proposition that when applied to a corporation the term "party" in DR 7-104 refers only to executive officers who can commit the corporation and not to lower-level employees, such as those who conduct training courses. See *In re FMC Corp.*, 430 F.Supp. 1108, 1110-1111 (S.D.W.Va. 1977); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1410 (1978); Model Rules of Professional Conduct Rule 4.2 comment (Proposed Final Draft 1981); Note, *DR 7-104 of the Code of Professional Responsibility Applied to the Government "Party,"* 61 Minn. L. Rev. 1007, 1014-1017 (1977).

Moreover, even assuming that the work product privilege would dissolve in civil litigation upon proof of respondent's charges, it does not necessarily follow that the materials in question would be subject to disclosure under the FOIA, since Exemption 5 exempts types of documents "*normally* privileged in the civil discovery context" (*NLRB* v. *Sears, Roebuck & Co., supra*, 421 U.S. at 149). Respondent's argument would apparently require FOIA courts to conduct mini-trials concerning alleged ethical violations by government attorneys.

respondent's characterization of them, are not in evidence, and the parties did not introduce other evidence concerning the events in question. There is thus no factual basis in the record for the new argument respondent now urges upon this Court.

3. a. When respondent finally turns to the question decided by the court of appeals and on which certiorari was granted, respondent attempts to defend the result below by arguing (Br. 16-17) that "the legal standard adopted by the court of appeals is restricted to determining whether the documents are exempt from disclosure pursuant to Exemption 5, and has no applicability to civil discovery." In other words, respondent maintains that these documents should be disclosed under Exemption 5 even if they would not be discoverable in civil litigation. This approach is contrary to the language of Exemption 5, which exempts from disclosure certain materials "which would not be available by law to a party other than an agency *in litigation* with the agency" (emphasis added). Respondent's approach is also fundamentally at odds with this Court's holding that Exemption 5 exempts "those documents, and only those documents, *normally privileged in the civil discovery context*" (*NLRB* v. *Sears, Roebuck & Co., supra,* 421 U.S. at 149 (emphasis added)). And respondent's approach would produce absurd results, for if documents not available in civil discovery may be obtained under the FOIA, a civil litigant will simply file an FOIA request if he is denied discovery or bypass discovery procedures altogether.

Respondent seeks to buttress its interpretation of Exemption 5 by contending (Br. 21) that in the FOIA context the work-product rule is subject to established limitations that do not apply in civil discovery. Although the first of these claimed limitations — that purely factual work-product materials do not fall within Exemption 5 — has been applied on occasion by some lower courts (see *Robbins Tire*

& Rubber Co. v. *NLRB*, 563 F.2d 724, 734-736 (5th Cir. 1977), rev'd on other grounds, 437 U.S. 214 (1978); *Deering Milliken, Inc.* v. *Irving*, 548 F.2d 1131, 1138 (4th Cir. 1977)), this Court has not approved that interpretation of Exemption 5 (see *NLRB* v. *Sears, Roebuck & Co., supra*, 421 U.S. at 154). And its validity is certainly open to question in view of the explicit privilege for such materials in Fed. R. Civ. P. 26(b)(3).[2] Moreover, that interpretation is based in part upon the view that purely factual materials, such as witness statements, are not "memorandums or letters" and thus do not fall within the language of Exemption 5. See, *e.g.*, *Robbins Tire & Rubber Co.* v. *NLRB*, *supra*, 563 F.2d at 737. By contrast, there is nothing in the language of Exemption 5 that even arguably supports the limitations upon the work-product privilege imposed by the court below.

Respondent also relies (Br. 22) upon the fact that Exemption 5 does not apply to a previously exempted memorandum if it is expressly adopted or incorporated by reference in a final agency opinion. *FOMC* v. *Merrill*, 443 U.S. 340, 360, n.23 (1979); *NLRB* v. *Sears, Roebuck & Co., supra*, 421 U.S. at 161. However, prompt disclosure of final agency

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[2]The view that Exemption 5 does not protect purely factual work-product materials is based principally upon *EPA* v. *Mink*, 410 U.S. 73, 85-91 (1973), which held that such materials are not shielded by the deliberative process privilege incorporated in Exemption 5. See *Robbins Tire & Rubber Co.* v. *NLRB*, *supra*, 563 F.2d at 734-737; *Deering Milliken, Inc.* v. *Irving*, *supra*. But, since the deliberative process privilege would not prevent discovery of purely factual materials in civil litigation either (*EPA* v. *Mink*, *supra*, 410 U.S. at 87-88), their disclosure under the FOIA is fully consistent with the rule that Exemption 5 protects only those documents "*normally* privileged in the civil discovery context" (*NLRB* v. *Sears, Roebuck & Co., supra*, 421 U.S. at 149 (emphasis added)). By contrast, the work-product privilege plainly does protect factual materials (see Fed. R. Civ. P. 26(b)(3)), and consequently their disclosure under the FOIA would appear to do violence to this Court's construction of Exemption 5.

opinions is explicitly required by the FOIA (5 U.S.C. 552(a)(2)). There is, in contrast, nothing in the FOIA expressly requiring disclosure of documents such as those at issue here. In addition, it is noteworthy that this Court has limited this intrusion upon the work-product privilege by holding that other documents falling within 5 U.S.C. 552(a)(2), such as instructions to staff that affect a member of the public, may nevertheless be shielded from disclosure under Exemption 5 on work-product grounds. *FOMC* v. *Merrill, supra,* 443 U.S. at 360 n.23; *NLRB* v. *Sears, Roebuck & Co., supra,* 421 U.S. at 160.

b. Respondent argues (Br. 22-33) that the policies underlying the work-product rule no longer apply when the litigation in connection with which the materials were prepared has ended and related litigation does not exist or potentially exist. Like the court of appeals (see Pet. App. 6a), respondent relies (Br. 23-26) upon the fact that the work-product rule was intended to safeguard the adversary process. From this, respondent reasons (Br. 26) that "once the litigation for which the documents were written has been completed, and no related or potentially related litigation exists, the possibility of damage to the adversary system is foreclosed." But as we demonstrated at some length in our opening brief (at 21-29), a lawyer's fears about the possibility that his files may be disclosed after all related proceedings have terminated and no potential litigation exists may well discourage him from amassing materials in preparation for trial or preserving those materials after the case has concluded. Such actions would seriously impair the functioning of the adversary system.

Respondent's only answer (Br. 28) is that "the need for written records will outweigh a lawyer's fear of eventual disclosure." However, this conclusory statement is neither substantiated nor explained in respondent's brief. In addition, respondent's reasoning is really an argument against

virtually all evidentiary privileges. For example, it could be argued by the same logic that the attorney-client privilege is unnecessary because a client's need to confide in his lawyer in order to obtain sound legal advice will outweigh his fear that confidential statements will be disclosed. Or it could be argued that the physician-patient privilege or the spousal privilege are superfluous for similar reasons.

Even assuming that the need for written records will outweigh most lawyers' fear that work product may subsequently be disclosed, the fear of disclosure is still likely to prevail in the minds of a significant number of attorneys, and undesirable consequences will result. Moreover, evidentiary privileges are intended to permit persons to engage in certain activities — *e.g.*, amassing work product or confiding in one's lawyer, physician, or spouse — without undue fear and anxiety. Thus, even if "the need for written records" would, in the end, overcome "the fear of eventual disclosure" under the court of appeals' rule, it would not follow that that rule is a salutary one.

Respondent's treatment of some of the subsidiary purposes of the work-product rule (Br. 27) is similarly flawed. For example, contrary to respondent's assertion, the court of appeals' rule might well induce some attorneys to rely upon work product from prior, terminated cases rather than engaging in their own independent trial preparation. Likewise, the court of appeals' rule would not eliminate an attorney's incentive to "insert false statements or misleading memoranda in [the] files" for the purpose of misleading a frequent adversary (see Resp. Br. 27). If genuine work product from a terminated case may be helpful to an adversary in a future, unrelated case, it stands to reason that false or misleading work product may be harmful to such an

adversary and therefore beneficial to the party from whom discovery is obtained.[3]

c. Respondent suggests (Br. 32) that the court of appeals' test would not produce undesirable consequences if applied in civil discovery because "irrelevant, vexatious and expensive discovery requests" may still be defeated by the district court's power to control discovery abuses. But this outer limit on the discovery process, often left to the discretion of the district courts, is not a substitute for a privilege that affords clearly defined protection. Although respondent concedes (Br. 33) that the FOIA does not contain even the relevancy requirement that limits discovery requests, since any person may obtain nonexempt documents, it claims (Br. 33) that "unduly burdensome" FOIA requests will nevertheless be discouraged because agencies may charge reasonable fees for searching for and copying requested documents. This assertion misses the point. The primary issue here is not the administrative burden of complying with FOIA requests for work product, but the harmful effects of disclosing such materials.[4] There is no reason to believe that the often minimal searching and copying charges that may be imposed would substantially reduce requests for work-product materials and, as a result, substantially lessen the injury that would be occasioned by the court of appeals' decision.

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[3]Respondent attempts to show (Br. 29-31) that the court of appeals' rule is supported by other courts and commentators. In our opening brief (at 30-32 & nn. 10, 11), we discussed the bulk of the authorities cited by respondent.

[4]Nevertheless, the burden of determining whether any related litigation exists or potentially exists would be substantial. And the cost of complying with FOIA requests far exceeds the fees agencies charge. For example, in 1982, the administrative costs incurred by the Federal Trade Commission in complying with FOIA requests totalled $639,120, while only $4,863 in fees was collected. Federal Trade Commission, *Freedom of Information Act Report 1982*, at 8.

d. Respondent attempts to demonstrate (Br. 33-35) that the related litigation test adopted by the court of appeals is workable, but respondent's efforts fall short. Respondent cites (Br. 34) several cases that have applied the test. However, simply because several courts have determined that work product either was or was not derived from what the courts deemed related litigation hardly means that the difficult problems described in our opening brief (at 21-23) will not develop. Moreover, the cases cited by respondent did not involve the federal government or federal agencies, and they therefore do not respond to our contention (Pet. Br. 22) that application of the concept of related litigation would be particularly difficult in cases involving government agencies.

Respondent maintains (Br. 34) that the court of appeals' "related litigation" test is analogous to 5 U.S.C. 554(d), which provides that an agency employee or agent who engages in the investigation or prosecution of a case may not participate in the decisionmaking process in the same or a "factually related" case. However, the court of appeals' test is not limited to "factually related" cases.[5] As noted in our opening brief (at 22), cases may be related in many other ways. Indeed, in the paragraph preceding its discussion of 5 U.S.C. 554(d), respondent lists (Br. 34) four other ways in which cases may be "related" for purposes of applying the court of appeals' test for disclosure of work product.

Respondent suggests (Br. 31-32) that uncertainty concerning the meaning of "related litigation" will not significantly influence trial preparation since attorneys are unable to predict at present whether work product will be disclosed

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[5]Even the meaning of "factually related" cases is unsettled. See Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 Colum. L. Rev. 759, 765 n.27 (1981).

to an adversary based upon a showing of "substantial need" (Fed. R. Civ. P. 26(b)(3)). Respondent ignores the fact that the most sensitive work product — "the mental impressions, conclusions, opinions, or legal theories of an attorney" — are protected from disclosure even when such a showing has been made (Fed. R. Civ. P. 26(b)(3); *Upjohn Co.* v. *United States*, 449 U.S. 383, 401-402 (1981)), and the district court found that the documents at issue in this case fall in that category (Pet. App. 23a). In addition, a subsequent FOIA request is probably far more likely to occur than subsequent civil litigation in which work product is sought and a sufficient showing of need is made. Thus, the uncertainty created by the decision below would far exceed any that now exists.

Respondent argues (Br. 35 n.20; emphasis in original) that "the term 'related litigation' should *not* encompass an FOIA action filed to seek disclosure of documents prepared in a prior suit." But respondent does not explain why a FOIA suit should never be regarded as "related" to a prior case even if the two cases share most of the characteristics identified by respondent (Br. 34) as relevant to this question. In this case, for example, the documents requested under FOIA were not only prepared in connection with the prior civil penalty action; they were also requested in discovery in the prior action by the same party, and the FTC's refusal to turn them over led to the dismissal of the case. The circumstances of the request also strongly suggest that respondent seeks the documents under FOIA precisely because of their relation to the prior suit.

Finally, while respondent attempts to show that the "related litigation" test is workable, respondent does not make a similar claim for the "potential" litigation test. Respondent appears to concede implicitly, as we argued in our opening brief (at 25), that the concept of "potential litigation" is "meaningless for all practical purposes."

e. Respondent contends (Br. 33, 35) that the court of appeals' decision will not hamper government litigation because some work-product materials may also fall within other FOIA exemptions. However, because respondent does not claim that this is true of all or most work product, respondent's point is largely irrelevant. The availability of other exemptions may reduce but certainly will not eliminate the deleterious consequences of the decision below. If respondent's argument were valid, it would apply equally to work product produced for litigation still in progress, but respondent does not make such a far-reaching claim.

A recent case involving respondent (*Grolier, Inc* v. *FTC*, Nos. 82-7018, 82-7178 (9th Cir. Feb. 10, 1983)) illustrates why the decision below will have a significant adverse effect upon the government's litigation efforts. Despite its awareness of the litigation in the Ninth Circuit (see Pet. App. 7a; J.A. 29), the court below held that no related case was pending or foreseeable and required disclosure of documents concerning an FTC investigation of respondent's deceptive and misleading practices in door-to-door sales of encyclopedias (Pet. App. 1a). The recent Ninth Circuit case affirmed an FTC cease and desist order relating to the very same type of practices. It is thus abundantly clear both why respondent is seeking the documents at issue here and why their nondisclosure remains important for the government's enforcement efforts despite the court of appeals' conclusion that no related litigation exists or potentially exists.

5. In conclusion, respondent urges (Br. 36) that if the Court determines that the court of appeals' decision does not adequately protect the government's interests, the judgment below should be affirmed on the narrow ground that Exemption 5 does not apply to documents relating to "(1) improper, unauthorized or unethical investigatory tactics that have since been abandoned by the agency, (2) where the litigation and investigation for which the

documents were written has been terminated, (3) where a district court has ordered, in the context of civil discovery, that the documents be disclosed, and (4) where no related or potentially related litigation exists."

This is an unadorned plea to create a special rule for this case — a rule "like a restricted railroad ticket, 'good for this day and train only.' " *County of Washington* v. *Gunther*, 452 U.S. 161, 183 (1981) (Rehnquist, J., dissenting), quoting *Smith* v. *Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). As we have shown, however, certain components of this proposed rule were not raised below and are based upon unproven facts, and the remaining components are legally unsound. Joining four defective arguments together does not produce a sound rule for deciding this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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